Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-543

OSCAR ROOSEVELT DOVE
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JOHN H. HARMON
P.O. Box 636
New Bern, North Carolina 28560
Tel: 919-633-3114

NORRIS C. REED, JR.
415 Broad Street
New Bern, North Carolina 28560
Tel: 919-637-2789

Attorneys for Petitioner

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Attorneys for Petitioner

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B. The Court's holding in Dunn v. U. S. 284 U. S. 390, to the effect that inconsistent verdicts are permissible in jury trials has not been examined in the context of a federal nonjury trial.

II. The Court should grant certiorari to consider whether the principle of collateral estopel stated in Ashe v. Swenson, 397 U. S. 436, was violated by the trial court in its use of certain evidence relating to events occurring on December 3, 1972 in its consideration of Petitioner's innocence or guilt of charges relating to February 27, 1973. 27

A. The refusal of the Court below to apply the principal of collateral estoppel to the petitioner's case was a refusal to follow this Court's holding in Ashe v. Swenson, 397 U. S. 436.

B. Use of the evidence which by inference might have indicated guilty knowledge on the part of petitioner, in light of the not guilty verdict which in and of itself indicated no knowledge, to show guilty knowledge on February 27, 1973, violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-

OSCAR ROOSEVELT DOVE
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals is unreported and is set out in Appendix A, hereto pp. 1, 2, 3, infra.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered September 23, 1974 and the Order denying the petition for rehearing was entered August 13, 1975, both of which are set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the rendering of inconsistent verdicts in nonjury trials in the Federal Court violates the due process clause of the Fifth Amendment to the Constitution of the United States?

2. Whether in a multi-count indictment, nonjury trial in federal court in which the petitioner was charged with drug possession violations on December 3, 1972 and February 27, 1973 and in which the government was preceding on the theory of constructive possession and on the theory of petitioner's guilt as an aider and abettor in that he knowing of the principal's drug involvement on each date aided and assisted him in that involvement and wherein petitioner was found to have had no knowledge of the principal's drug involvement on December 3, 1972 by a not guilty verdict on those counts, whether the petitioner could nevertheless be found guilty of the possession charges relating to February 27, 1973, if that guilty verdict required a finding that he had such knowledge of the principal's drug involvement on December 3, 1972?

3. Whether, in the context of the instant case, the failure of the trial court to make special findings violated petitioner rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

4. Whether the evidence supporting petitioner's convictions were so lacking in substance that the convictions violated his due process rights under the United States Constitution.

5. Whether Petitioner rights under the Fourth Amendment to the United States Constitution were violated by his arrest and the subsequent seizure of items from his person and the vehicle that he was operating?

CONSTITUTION AND STATUTORY PROVISIONS INVOKED

1. This case involves the Due Process and Double Jeopardy Clause of the Fifth Amendment and the Fourth Amendment to the United States Constitution.

2. This case also involves Rule 23 (c) of the Federal Rules of Criminal Procedure.

STATEMENT OF CASE

This is a petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 23, 1974, rehearing denied August 13, 1975, affirming petition's conviction and 15 years prison sentence. Petitioner was convicted of the offense of unlawful possession of narcotic drugs and unlawful possession of firearm while in the commission of a felony. Petitioner was charged in a indictment with possession of drugs on two occassions, to wit, December 3, 1972 and February 27, 1973. A co-defendant Samuel Stallings was charged in the same indictment with possession of the same drugs on the same dates and was in addition charged in the same indictment with possession of drugs on another date, to wit January 12, 1973. A third co-defendant Eli Edmondson was charged with possession of drugs on December 3, 1972 and January 12, 1973, in the same indictment the drugs being the same as those charged to the petitioner and Stallings on December 3, 1972 and to Stallings on January 12, 1973. At the beginning of the trial Stallings pleaded guilty to violations charged on January 12, 1973 and February 27, 1973 and Edmondson pleaded guilty to the violations charged on January 12, 1973. Petitioner pleaded not guilty and was tried by the Court, sitting without a jury. The evidence adduced at the trial was as follows:

EVIDENCE IN THE CASE

DECEMBER 3, 1972

The testimony of narcotic agent Price was to the effect that a few days prior to December 3, 1972, he had entered into conversation with Eli Edmondson concerning purchasing some heroin from a man named Stallings in New Bern, N. C. That on or about December 2, 1972, the plans were finalized for a trip to New Bern to purchase two ounces. That Oscar Dove was never mentioned in these earlier conversations. That Price, Edmondson and an informant named Walker left Washington, D. C. to travel to New Bern to make the buy. They stopped in Petersburg, Va., where Edmondson called New Bern and told Stallings they were on the way. They arrived in New Bern and drove to Rice's Grill at about 12:00 or 12:30 a.m. on December 3, 1972. They then called Stallings and told him where they were.

A short time later, Stallings drove up in a Pontiac station wagon owned and being operated by Oscar Dove. Price, Edmondson and Walker got out of their car and got in the back of Dove's car where Price and Stallings had a conversation about the price of heroin. Dove then wanted to get the heroin and stated to Stallings; "We will take them around and then we will get the heroin". Price then said he was hungry and Dove told Stallings to get the stuff and he would go inside with them to get something to eat. After they had gotten something to eat, Dove then told Price he would drive their car around to meet Stallings. He then drove to a service station owned by Dove. Dove unlocked the door and Price and Stallings went inside to the back of the store where Stallings gave Price the heroin in return for $1,500.00. Price also testified that while at the Grill, Dove gave him directions how to leave the City without running into the Police and that after he had made his deal Dove led them out of the City.

The informant Walker testified that while Price and Stallings were in the back of the station completing the heroin deal Dove had a conversation with him outside the station in which Dove told him he could get Walker some cocaine if Walker could come up with the necessary financing.

For the defendant Dove, Eli Edmondson testified that he came to New Bern with Price and Walker on December 3, 1972, mainly to show them the way and to introduce them to Stallings. He said that Oscar Dove's name was never mentioned in any of the pre December 3, 1972, conversations he had with Price. He said it had been at least 10 years since he had last seen Dove. He said that he called Stallings from Petersburg, and that Dove and Stallings did drive up to Rice's Grill that night, but that Price and Stallings went off to themselves to have their conversation. That nothing was said about heroin in his presence or in Dove's presence. That they never got in the back of Dove's vehicle. He said that they did go to this service station and that Price and Stallings did go inside and stay a few minutes. That he, Dove and Walker remained outside. That he never heard Dove say anything about any cocaine.

Sam Stallings testified that he met with Price at Rice's Grill that night. That when he first received the call from Edmondson that night, he was at Dove's house. That he lived in one of Dove's apartments just to the rear of Dove's house and that he had no telephone. That he always gave people Dove's house or business number when they wanted to be able to contact him. That when he received the second call from Edmondson from Rice's Grill he was again at Dove's house where he had been waiting for the call. That Dove went with him for two reasons. One was that Dove wanted to see Eli because Eli owed him some money and second Dove wanted to pick up another of his cars which he had left at the service station for repairs.

After seeing Eli, Dove was going to let Stallings drive the Pontiac back home and he, Dove was going to drive the repaired car back home. Stallings testified that he never told Dove why he was meeting Eli and the others at the grill that in fact, he did not want Dove to know what was going on. That all the conversations and deals with Price about the heroin were private and never in Dove's or anyone else's presence.

Dove, himself testified essentially to the same thing. That he never knew Stallings went to Rice's Grill to sell heroin or that Stallings had any heroin. That there was never any conversation about heroin or any other drug in his presence; that he never said Sam, let's go get the heroin and that he never had any conversation about cocaine with the informant Walker.

All of the witnesses for the government admitted that when they came to New Bern, on December 3, they did not come to meet with Dove. They further admitted that they made no purchases from Dove on that date, had no discussions with him about the price of heroin that they received no delivery of the heroin from him and never saw any in his possession. (8A).

JANUARY 12, 1973

Price testified that as a result of a telephone conversation he had with Stallings, he came to New Bern on January 12, 1973, where at Robbie's Rib House he had another transaction with Stallings involving the sale of heroin. That on this occasion he had reached Stallings through one of Dove's numbers, Stallings not having a telephone as pointed out earlier. Price testified that Dove was not even in New Bern on this date.

FEBRUARY 27, 1973

Price testified that on February 26, 1973, he had a telephone conversation with Stallings and had arranged for

a purchase of 8 ounces of heroin in New Bern the next day. That Stallings had given him 2 telephone numbers he could call to reach him, the same numbers he had called in the past 638-1156 and 637-3376; These were Dove's numbers, his Mortuary and his residence. Price and Quander and other agents came to New Bern the next day and got a room at the Holiday Inn for headquarters. Price then called 638-1156 and Dove answered the phone. He asked for Stallings, at which time Dove told him that Stallings was not there but that he was probably at Robbie's Rib House, Dove told him to stay where he was and he Dove would come down and lead him to Robbie's or try to find Stallings for him, (12A, et al). A short while later Dove then drove down to the Holiday Inn and they, Price and Quander followed behind in their car. Price testified that when he told Dove he was suspicious of the police Dove told them that he would lead them back to his Mortuary, which is outside the City limits. After they got to the Mortuary Dove then asked them if either of them wanted to go back into town with him to try to find Stallings. Price and Quander both stated that they wanted to stay together and that he should go alone to find Stallings (12A). Price further testified that on this occasion, he had no conversation with Dove about narcotics (22A), Dove then left.

About 30 minutes later, Dove drove up followed by Stallings in another vehicle. They both got out and Price and Stallings started talking about the heroin. Price said Dove was 8 or 10 feet away and was not involved in the conversation. Price had testified earlier that at the Holiday Inn, there had been a meeting of the agents at which time a plan had evolved. The plan was that Price would meet with Stallings; that the other agents would be in a position to observe the meeting. If Stallings had the heroin, Price would go to the trunk of his car and raise the lid which would be the signal that Stallings had the heroin, at which

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time, the agents would move in and arrest Stallings, Price testified that after talking with Stallings, he went to the rear of his car to raise the trunk lid, at which time Stallings said he could get even more heroin. Therefore Price never raised the lid. Stallings then went over and said something to Dove and they both got in a blue van and left the area with Dove driving. About 30 minutes later Price saw the blue van coming down a road at the rear of the Mortuary. That the van made a left turn and went in a direction away from the Mortuary. That Price then saw the agents give pursuit of the van in a government vehicle. The agents were McCracken, Sheehan and King. Dove denied that he overheard any of the conversation between Price and Stallings. Quander the agent with Price testified that Dove had come to the Holiday Inn and led them back to the Mortuary. That Dove had told them Stallings was probably at Robbie's. That Dove was just trying to help them locate Stallings. (24A et al) Quander further testified that Stallings and Price carried on a two man conversation to the rear of the car out of his presence and out of Dove's presence (29A).

The substance of testimony of agents McCracken, Sheehan and King was that they had come to New Bern on February 27, 1973 on the sale of heroin from Stallings to Price. That they had had a meeting at the Holiday Inn and had evolved the plan above mentioned for the apprehension of Stallings. That they had observed the Price Stallings conversation at the Mortuary but they said that it was a 3 man conversation Price, Stallings and Dove, this is in direct contradiction of Price and Quander and Dove and Stallings who all said it was a two man conversation.

These three agents testified they had taken up a position of observation behind the Mortuary. That after the conversation Dove and Stallings got in the blue van again with Dove and Stallings with Dove driving. That

their car was unmarked and they themselves, had nothing displayed which identified them as narcotics agents. That although they knew of Price's two previous purchases on December 3, and January 12, that they did not at the time, know of the substance of the conversation, Price had just previously had with Stallings at the Mortuary. That as the van passed them Stallings looked around in their direction, that the van then speeded up came to the end of the dirt road and made a left turn down a paved road in a direction away from the Mortuary. That they immediately pursued the vehicle (30A). That they got behind the vehicle flashed their lights and placed their badge outside the window. That the van immediately stopped and pulled off on the shoulder off the road. That Sheehan went to the driver's side and King went to the passenger's side. That both persons were ordered out of the van Dove got out immediately. It took a minute to get Stallings out. That Dove was searched and he had two guns. At this point counsel for defendant objected to any testimony about anything found on the person of Dove or in the van. Judge Larkins stated that since it was a non-jury trial he would reserve his ruling and hear all the evidence (35A). King testified he had some difficulty getting Stallings out of the van. On direct examination, McCracken had stated that the agents had come to North Carolina to purchase heroin from Stallings and Dove; However, on cross-examination he reluctantly admitted they had not come to see Dove (36A et al).

McCracken later testified on cross-examination that he pursued and arrested Dove and Stallings because he believed them to be in possession of narcotics at the time of the arrest (44A et al). McCracken admitted that according to the agreed upon sign he was to arrest Stallings when Price gave the signal that Stallings had the heroin. He admitted the sign was never given (45A). He further

admitted that if Price didn't give the signal, that would mean Stallings didn't have the drug (46A).

Sheehan testified first that once the van passed their observation post, it speeded up and went down a road in a direction away from the Mortuary. He was attempting to show flight on the part of Dove. However, he was forced to admit that the top speed they had to reach to catch the van was 55 mph to 60 mph and that they caught up with the van in a very short distance (47A et al). He further testified that the van stopped immediately upon their flashing the lights on the government vehicle (51A). See also Appendix pages 47A, 48A, 49A, and 50A on the question of the flight.

Agent King testified that he went to the passenger side and arrested Stallings. He stated that Stallings did not get out immediately (53A). He also stated:

> "After placing Stallings under arrest, I placed handcuffs on him I immediately entered the van to make sure there were no other individuals in there that could cause harm to any of the agents I observed a tin foil".
>
> OBJECTION: Overruled
>
> JUDGE LARKINS: Was there anyone else in the van?
>
> THE WITNESS: No sir, there was not.
>
> KING CONTINUED:
>
> "At this point, I observed a tin foil packet directly behind the passenger seat".

This was later analyzed to be heroin which was the subject of County (5) of the indictment. King admitted that there was a prearranged signal to be made when Price wanted them to come in and arrest Stallings and further admitted that the signal was never given (56A).

For the defendant with respect to February 27, 1973, Stallings testified that he had received a call from Price on February 26 and had arranged a sale for February 27, in New Bern that he had received the call at 637-3376 one of the two numbers he had given Price on December 3, 1972. When Price got to New Bern on the 27th he was supposed to call Stallings and tell him where he was. That on the morning of the 27th he had advised Oscar Dove that he would be receiving a call and told him to let him know when the call came. Later that day, Dove got up with him on Bern Street in New Bern and told him that some people wanted to see him over at the funeral home. He then followed Dove back to the funeral home. I then got out and Price got out and we carried on a conversation about the heroin. Quander remained in the car and Dove went off someplace. It was a private conversation with Price, he went back over where Dove was and told him he wanted him to take him to New Bern. Dove then said he had to take some furniture off the van first. That he and Dove then went to Dove's house in the blue van, that they went to feed some dogs and they then started to deliver the furniture. That they took the route down past the rear of the Mortuary because it was the most direct route. That he saw a man down behind the Mortuary near a car but that he did not know that he was an agent or officer. That when Dove saw the flashing lights behind him he immediately pulled over. That he had never told Dove of the substance of the conversation he had had with Price, either on this occasion or the earlier occasions. That he never told Dove that he had any narcotic drugs in his possession on February 27, 1973 (90A). He further testified that when they were stopped, they were in front of the place where they were going to deliver the funiture (93A). He further testified as follows:

"While going down by the funeral home, I never mentioned to Dove that I had some narcotic drugs on me. I did in fact have some heroin in my pocket. I had had it in there about two days. I had it in my pocket while talking to Price at the Mortuary. I did not tell him I had it.

When we were going down beside the funeral home. I saw a white man stooping down by a car. I mentioned it to Oscar, we then made our left turn and went to down where we were going to deliver the furniture. Just as we got ready to stop. I recognized the car behind me. It was still blinking the lights and so I still did not know who it was or nothing. So when they stopped and jumped out I seed the fellow with the gun in his hand Mr. King. So when I heard him say narcotics agent, get out, and I thought about this stuff, so that is why I was feeling in my pockets trying to find out where it was. But it was in my shirt pocket. And I didn't know where to throw it. So I put it in the back of the van. I was searching in my pockets, like this trying to see where it was at. So I pulled it out and throwed it over my right shoulder. I did not see where it landed but I know it was on the passenger side. Prior to this time I had never said anything to Oscar Dove about it. I told the agents when they got it, I said that is mine where you got there. I didn't want Dove to know anything I know he wouldn't have been with me if he had knowed I had it. When I went down town. I told them again it was mine (95A et al)."

At page 838 and 839 Transcript (103, 104A) the following appears (Testimony of Stallings).

Q. The heroin that the agent found in the 1972 Econoline on February 27, 1973, was that the same heroin you had in your pocket?

A. Yes.

Q. Was that the same heroin that you had taken out of your pocket and thrown over your shoulder?

A. That is right.

Q. Did Oscar Dove ever have in his possession that particular heroin?

A. No.

Q. Was it his heroin?

A. No.

Q. Did you ever give Oscar Dove any of the money you received?

A. No.

Q. On December 3rd?

A. No.

Q. Was there ever any arrangement between the two of you where he was to receive some of the money?

A. No.

In substance Oscar Dove testified that he was 48 years old, married with three children, no criminal record and the owner of Oscar's Mortuary. That he had known Samuel Stallings for 25 years and during that time, they had become very good friends. That Stallings lived in one of his apartments behind his house and had the unlimited use of his telephones and automobiles, that he owned the Shell Service Station, where the December 3rd transaction had taken place. That on December 3rd he went to Rice's Grill with Stallings because he wanted to see Edmondson who owed him some money. That he also wanted to pick up a car he had left at the service station for repairs. That at Rice's Grill, Price and Stallings carried on a private conversation at the rear of the Grill outside while he carried on a general conversation with Walker and

Edmondson near the front of the Grill. That the three of them went inside to get something to eat. That Stallings came in later and got his key and went off in his car. That the rest of them later went to the service station. That Price and Stallings went to the rear of the station. That he checked the stall and saw that his car was not ready and then went outside and carried on a general conversation with Walker and Edmundson. That there was never any conversation about heroin or any other narcotic drug in his presence at either Rice's Grill or the service station. He denied making any of the statements attributed to him by Price and Walker. That he never had any narcotic drugs in his possession on December 3rd, never saw any, never discussed any price for any. He testified on February 27, 1973, that he had received the call that day and as a result went to the Holiday Inn to try to help the people find Stallings. That when he got back to the Mortuary, he asked them if they wanted to go with him to Robbie's Rib House, where Stallings would probably be. That when they declined, he went by himself and found Stallings on Bern Street. That he and Stallings then came back in separate vehicles. That Stallings then carried on a conversation with one of the persons after which Stallings rode with him to his house where he picked up two guns then took his wife's car to the service station and left it and then was driven back by a Reverend. That Stallings had gone to his apartment while he was going to take his wife's car. That after returning he and Stallings got in the van and went and fed the dogs, after which they started to the house where they were going to take some furniture off the van. The road down behind the funeral home was the most direct route to the house. That as they passed down behind the Mortuary Stallings mentioned a white man near some bushes, but they had both dismissed that as not being important. That as they reached the house were they were

going to deliver the furniture, he saw flashing lights behind him and the men jumped out with guns. That when one of the men came to his side of the truck and ordered him out he got out, immediately. That it was when one of the men ordered him to give it up that he advised him that all he had was two guns on him. That they then had him to get on his knees and one of them told him if he moved he would blow his G.D. head off. That he got so scared, he urinated on himself. That he never knew Stallings had any narcotics on him on this ocassion never knew any narcotics where in the van. That he did not possess any heroin on that occassion. That he never overheard any of the conversation between Price and Stallings at the Mortuary. That Stallings never told him he had heroin on him. He stated that he would not have been driving the van if he had known the heroin was on the van (106A).

Before being cross examined, Dove presented approximately 30 character witnesses all of whom were identified five of whom testified; Dr. S. F. C. Barnwell, Reverend Charles Ewing, Senator D. Livingston Stallings, Mr. W. C. Chadwick and Mr. Rip Summerell.

Dove denied that he ever told Price that he would lead him back to his Mortuary on February 27, 1973, so as to get outside the City Limits.

Price was recalled in rebuttal and with respect to December 3rd, stated;

> "And Mr. Dove stated to Mr. Stallings and the rest of us in the car, he said, let's go get the stuff at which time, I stated that I was hungry and I wanted some coffee..."
>
> "And then Mr. Dove stated to Mr. Stallings, why don't you go get the stuff and I will stay with Price and the others until they finish eating."

Albert Logan was called as a rebuttal witness and mainly testified that he was inside Rice's Grill on December 3rd and that he observed Dove and Stallings drive up and saw Walker, Price and Edmondson get in the rear of Dove's station wagon and that he later observed all but Stallings come in the Grill. The substance of the Testimony of all the government witnesses is to the effect that none of them ever discussed with Dove purchasing any drugs from him, never saw any in his possession, never came to New Bern to see him about drugs, never had any telephone conversations with him about drugs. See Transcript pages 197, 198, 199, 200 (8A et al).

The defendant Dove made a number of Motions and objections at the trial which serve as the basis for this appeal and which are enumerated as follows:

We objected at every point to the introduction into evidence of all items seized from the person of Oscar Dove and the van that he was operating. We objected when the government first sought to introduce the pistols and the heroin and we also filed a written Motion to suppress at the close of all the evidence as part of our Motion for judgment of acquittal as to each count. We had made a Motion for Judgment of acquittal at the close of government's case. There was never a voir dire as such conducted on our Motion to Suppress. Judge Larkins held that since it was a non-jury trial he would hear all the evidence on direct and cross examination and then rule. When he finally overruled our written Motion to Suppress, he never made any findings of facts or conclusions of law. For that reason counsel does not know the basis of the ruling or how the question of the disputed facts, such as whether or not Dove had sought to flee from the agents was revolved. The questions of whether or not there was flight is very crucial. The court said;

Judge John D. Larkins, Jr.

"The Court having heard oral argument in support of the written motion to suppress and in support of the judgment of acquittal, and having heard oral argument of the U. S. Attorney in opposition to said Motion. The Motion to Suppress is denied and overruled and the motion for Judgment of acquittal is overruled and denied. (140A)."

Judge Larkins made a similar statement in denying the Motion for Judgment of Acquittal made at close of government's evidence.

On the question of guilt or innocence, the Judge had this to say.

JUDGE JOHN D. LARKINS, JR.

"This court sitting without the intervention of a jury. The jury having been waived and having heard all of the evidence in the case, and oral argument of counsel both for the government and for the defendant the evidence in this case compells this court sitting without the intervention of a jury to find the defendant, Oscar Dove not guilty as to the offenses charged in counts one and two.

However, this court sitting without a jury finds from all the evidence in this case and beyond a reasonable doubt that the defendant Oscar Dove is guilty of the offenses charged in Count five and six (141A)."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner in his brief filed with the Court of Appeals raised the questions of the inconsistency of the verdicts the

sufficiency of the evidence the unlawful arrest and search, and the failure to make special findings and argued that the inconsistent verdicts were invalid, the evidence was insufficient the arrest and search was unlawful and that the failure to make special findings constituted error requiring a new trial. The Court of Appeals in a per curiam opinion affirmed the convictions without discussing the issues raised.

2. Petition raised the issue of collateral estoppel in his petition for a rehearing, to which he attached a legal memorandum bringing to the Court of Appeals attention its decision in U. S. v. Phillips 502 F. 2d 227 in which the Court of Appeals held that the principle of collateral estoppel stated in Ashe v. Swenson was applicable to the Phillips case. That the Court of Appeals prior to ruling on petitioner's petition for a rehearing decided to consider the case of U. S. v. Phillips en banc and deferred a decision on Petitioner's case pending the en banc decision on U. S. v. Phillips. That en banc the Fourth Circuit by a 4-3 vote decided that collateral estoppel did not apply in the Phillips case although Phillips was reversed on other grounds and a few weeks later denied petitioner's petition for a rehearing without discussion the issues raised in the petition. By inference it can be said that Fourth Circuit held that the principle of collateral estoppel did not apply in the petitioner's case.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER INCONSISTENT VERDICTS IN NONJURY TRIALS IN THE FEDERAL COURTS VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Diligent research by counsel fails to disclose any instance in which this court has before considered and ruled upon this issue. This Court did rule in Dunn vs. U. S. 284 U. S. 390 that inconsistent verdicts are permissible in jury trials.

Before discussing further this issue petitioner would like to briefly comment on the question of whether the verdicts are in fact inconsistent. Petitioner would argue that they are inconsistent. First of all, although the evidence as to each date was different, the line-up of witnesses was essentially the same. For the government in each instance you had John Price, the agent and for the petitioner in each instance you had the petitioner and co-defendant testifying. For the government on December 3, 1972 there was the addition of the informant testifying and on February 27, 1973, there was the addition of three government agents who made the arrest, testifying. Essentially the government case was John Price, and the petitioner's defense was petitioner and Stallings. In addition to his other testimony, Price testified concerning statements allegedly made by petitioner in the presence of Price, Stallings, Edmondson and the informant, which testimony if believed would indicate not only that petitioner knew that Stallings was engaged in a criminal enterprise concerning drugs, but that the petitioner himself was engaged in a joint venture with Stallings to sell the drugs. Price's testimony was:

> .....Dove then wanted to go get the heroin and stated to Stallings "we will take them around and then we will get the heroin." (Pet Brief-pp 4, 5).

In addition to this testimony the informant testified that while Price and Stallings were inside Petitioner's service station concluding their drug transaction petitioner was outside talking to him and trying to arrange the

sale of some cocaine in the future. (Pet. Brief P. 5). Of course Petitioner denied making either of these statements. These statements were offered by the Government to show that Petitioner knew what Stallings was engaged in. When you add this disputed evidence to the undisputed evidence of the fact that Stallings was engaged in a criminal enterprise concerning drugs and that Petitioner did in fact aid and assist him by driving him to the restaurant by allowing him to use his car in which he apparently transported the heroin, and by unlocking his service station and allowing Stallings and Price to go inside where they transacted their illegal business, the only reasonable conclusion to draw from the not guilty verdict is that the trial court disbelieved the testimony of the government witness relating to the disputed testimony, the statements allegedly made by petitioner, and that as a result of the disbelief, the trial court found that Petitioner did not know what Stallings was engaged in. There is no reasonable way that the trial court could have found that Petitioner made these statements and then still found him not guilty. Certainly, all of the other elements of aiding and abetting were present, those being that Stallings was engaged in a criminal enterprise and Petitioner did in fact aid and assist him. The only element that could have been missing was knowledge and by his verdict, the trial court found that it was in fact missing.

Based on the above, any verdict of guilty as to February 27, 1973 would be inconsistent with the verdict of not guilty as to December 3, 1972. For one thing, nowhere in the record of this trial is there any evidence that Petitioner made any statements on February 27, 1973, concerning possession, distribution or knowledge of drugs. In fact all of the government witnesses who testified expressly stated that they had no such conversation with petitioner nor did they witness any such conversation take place. In addition

there is no evidence that Petitioner and Stallings were engaged in a joint enterprise on February 27, as was the case on December 3rd (Price's testimony that Petitioner said, "Sam and I will go get the heroin while I go inside Rice's Grill with them.") Further, there was nothing that Petitioner said or did on February 27th which would reasonably support the conclusion that Petitioner knew what Stallings was doing on that date.

The only testimony offered by the government which would arguably be incriminating was the testimony of Price to the effect that when he had expressed some misgivings about two city policemen that he had seen near the Holiday Inn, that Petitioner told him that he would take him out to the Mortuary which was outside the city limits. Even if this testimony is true, Petitioner's criminal intent is completely negated by the uncontradicted evidence in the record that after they had all reached the Mortuary, Petitioner tried to get the agents to go back into town with him to locate Stallings at Robbie's Rib House. Both government agents admitted as much. The only act committed by Petitioner which the government contended showed Petitioner's knowledge of Stallings activities was the testimony of the three agents who made the arrest to the effect that Petitioner who was operating the van in which the heroin was found had attempted to flee from capture just before his arrest on February 27th and in so doing had attempted to aid and abett Stallings to escape capture for the heroin that was found in the van. However, on this point, the government's own evidence negates this inference. The substance of their testimony was that they had observed a meeting between Price and Stallings behind the Mortuary earlier that day, after which Stallings and Petitioner got in Petitioner's van and drove off with Petitioner driving. That they were either standing or stooping behind their car which was unmarked and that

they were dressed in plain clothes with nothing on them or their car to indicate that they were law enforcement agents. They also testified they were positioned behind the Mortuary along the side of the road that ran behind the Mortuary. They testified that approximately 30 minutes after the Price-Stallings meeting, they saw the van coming down the back road with Petitioner driving and Stallings a passenger. That the van passed by their position and Stallings looked in their direction, after which time, the van speeded up, came to an intersection and made a left turn and drove away in a direction away from the Mortuary. That they got in their car and gave immediate pursuit (App filed with Circuit Court-p 30-A). That in a short period of time they got behind the van, flashed their head lights and placed their badges outside the window. That the van immediately stopped and pulled off on the shoulder of the road. One agent went to the Petitioner's side and one agent went to the passenger or Stallings side. Petitioner immediately got out. It took a minute or two to get Stallings out. The agents were forced to admit that they did not have to exceed the speed limit to catch the van and that they caught up with it in a very short time. They further testified that the van stopped immediately upon their flashing the lights on the government vehicle. See also Appeals Court Appendix 47A, 48A, 49A and 50A on the question of flight. Agent King testified that he went to the passenger side and arrested Stallings. He stated that Stallings did not get out immediately and testified:

> "After placing Stallings under arrest, I placed handcuffs on him. I immediately entered the van to make sure there were no other individuals in there that could cause harm to any of the agents. I observed a tin foil."
>
> OBJECTION: Overruled

JUDGE LARKINS: Was there anyone else in the van?

THE WITNESS: No Sir, there was no one King continued.

"At this point, I observed a tin foil package directly behind the passenger seat." (See Appeals Appendix-53A).

This tin foil packet was later found to contain the heroin which was the subject of County (5) of the indictment. The government in its brief filed with Court of Appeals conceded that the heroin belonged to Stallings and that it had been in Stallings shirt pocket when the van was stopped by the federal agents and that in an effort to dispose of the incriminating evidence, Stallings threw the heroin package over his shoulder into the rear of the van. The government conceded that these were the true facts and that they showed Stallings to be in actual possession of heroin (Govt. Brief pp. 10, 11). The government contended however that there was sufficient evidence to infer that Petitioner knew of Stallings possession of this heroin and that he actively aided and abetted Stallings in assisting him in getting in contact with undercover agent Price for the purpose of selling heroin (Govt. Brief- P.11). The basic support the government offers for its contention that Petitioner knew what Stallings was doing on February 27, 1973 is the evidence of Petitioner's statements on December 3, 1972, which indicated knowledge. However, petitioner would contend that the not guilty verdicts as to December 3, 1972, foreclosed consideration of that evidence. Therefore petitioner's point is that the events of February 27, must stand or fail on their own and cannot be supported by the December 3rd, evidence.

With respect to that point, petitioner would argue that there is nothing in the record concerning the events of February 27, 1973, to indicate either directly or by inference that petitioner knew Stallings was in possession

of the heroin which was found in the van. In fact the only testimony on this point is to the contrary, that being the testimony of Stallings and Petitioner (Appellant's Brief-pp-13, 14, 15, 16, 17, 18, 19).

Based on the above, the petitioner would urge that the verdicts are inconsistent. That being so the question becomes whether the inconsistent verdicts are permissible in nonjury trials such as the instant case.

In the landmark case of Dunn vs. United States 284 U. S. 390, this court had the opportunity to consider the question of inconsistent verdicts insofar as they related to jury trials. This Court held that such verdicts are permissible in jury trials and offend no sections of the United States Constitution or the amendments thereto. As far as counsel has been able to determine this Court has never decided whether the holding in Dunn should be extended to nonjury trials in our federal courts. The leading case on this question would appear to be Maybury v. United States 274 F. 2d 899 (2nd Cir. 1960) which held that inconsistent verdicts are not permitted in trials by the Court, sitting without the intervention of a jury. In Maybury, the government citing the Dunn case contended that the principle of Dunn should apply to nonjury trials stating among other things that the waiver of a jury substituted the judge for the jury in all respects. Judge Friendly who wrote the opinion in Maybury first summarized the historical reasons why inconsistency was allowed in jury trial, they being:

(1.) The special considerations relating to the nature and function of the Jury in such cases. On this point Steckler v. United States 7 F. 2d 59 (2nd Cir. 1925) was cited for the following language.

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or

> the conviction, the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Judge Friendly found that this language had been quoted with approval by Mr. Justice Holmes in the Dunn case, who had also added a reference to Horning v. District of Columbia 254 U. S. 135, (1920) in which he noted that in a criminal case "the jury had the power to bring in a verdict in the teeth of both law and facts." Justice Friendly then talked about other considerations the very beginning of the use of the jury as a mode of trial, the arbitralelement in a jury trial the requirement of unanimity, that the verdict of the jury is not the verdict of twelve men, it is the verdict of a community, that ignoring consistency in the jury's disposition of the counts of a criminal indictment may be deemed a price for securing the unanimous verdict that the Sixth Amendment required.

Judge Friendly then found that none of these considerations were applicable to the trial of a criminal case before a Judge. That there was no arbitral element in a nonjury trial, that if a judge wanted to exercise lenity, he could do so at the time of sentencing, there was no need to permit inconsistency so that the Judge could reach unanimity with himself. Judge Friendly then announced the following:

> "We do not believe we would enhance respect for law for the Courts by recognizing for a Judge the same right to indulge in "Vagaries" in the disposition of criminal charges that, for historic reasons, had been granted the jury, U. S. v.

> Datterwich 1943, 320 U. S. 277, 279... We know the role of logic in law is not unlimited; but "Holmes did not tell us that logic is to be ignored when experience is silent. Cardoza, the nature of the Judicial Process 33." Since we find no experience to justify approval of an inconsistent judgment, when a criminal case is tried to a judge, we think logic should prevail".

The Ninth Circuit in the case of McElheny v. United States 146 F. 2d 932 (1944) expressed a contrary view to the view taken in Maybury and held that inconsistent verdicts are permitted in nonjury trials. However, the Ninth Circuit in its opinion did not discuss whether the considerations in jury and nonjury trials are necessarily the same. Since the Maybury decision in 1960 its holding has been cited with approval in United States Ex Rel. Owen v. McMann, 435 F. 2d 813 (2nd Cir. 1970); United States v. Zamora-Corona, 465 F. 2d 457 (9th Cir. 1972). It is interesting to note that although the Court in Zamora found the verdicts not to be necessarily inconsistent, and therefore did not have to reach the issue of whether they were permissible, the Court did cite Maybury as the lead opinion and its own circuit case, McElheny as a contrary opinion, which is an indication that McElheny may have been overruled if the verdicts had in fact been inconsistent. In United States v. Bethea, 483 F. 2d 1024 (4th Cir. 1973) not only was Maybury cited with approval at page 1030, but in addition the Court refused to extend the Dunn rule to a jury trial where the jury had acted irrationally.

In addition to the reasons set forth above this Court should grant Certiorari to consider this issue of inconsistent verdicts because there is an apparent conflict between the two circuits that have written opinions on the subject the Second Circuit in Maybury and the Ninth Circuit in McElheny.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PRINCIPLE OF COLLATERAL ESTOPPEL STATED IN ASHE V. SWENSON 397 U. S. 436, FORECLOSED THE TRIAL COURT, SITTING WITHOUT A JURY FROM CONSIDERING EVIDENCE WHICH INFERRED PETITIONER'S CRIMINAL KNOWLEDGE ON DECEMBER 3, 1972, WHEN THE TRIAL COURT WAS CONSIDERING THE QUESTION OF PETITIONER'S CRIMINAL KNOWLEDGE ON FEBRUARY 27, 1973, IN LIGHT OF THE COURT'S FINDING OF NOT GUILTY AS TO THE PETITIONER'S CRIMINAL KNOWLEDGE ON THE EARLIER DATE.

The record in this case does not indicate whether the trial court used the December 3rd evidence to support the February 27th convictions. The government conceded that the isolated facts of February 27th were insufficient standing alone to support the convictions and that the December 3rd evidence was necessary. Therefore, petitioner assumes that said evidence was in fact used. The question is whether it was proper to do so. Petitioner would maintain that under the circumstances of the instant case, it was not proper to do so.

Petitioner would urge that it was not proper to use any evidence of December 3rd indicating Petitioner's guilty knowledge on that date in light of the not guilty verdict which by implication was a finding of fact that he did not have such knowledge. In particular, petitioner is referring to the statements allegedly made by Petitioner on December 3rd, that "Sam and I will go get the heroin while you go in the restaurant" and the statement made to the informant at the service station to the effect that he the petitioner could get the informant some cocaine for the right prices. In order to find that Petitioner lacked knowledge, the trial court had to find that he did not

make the above statement, for either or both of them would have indicated knowledge.

Having found the petitioner not guilty as to the December 3rd charges, the trial court implicitly found that he lacked guilty knowledge and having found that he lacked guilty knowledge, he had to have found that he made neither of the statements attributed to him. Having determined that he did not make the statements, the questions of whether or not he made the statements should have been foreclosed to the trial court. It certainly would be impermissible for the trial court to have found that as to the December 3rd offenses, he did not make the statements, but as to February 27th offenses, he did in fact make the very statements which the court had previously said he did not make. This would be the epitome of irrationality.

Petitioner would argue that the panel opinion of the Fourth Circuit in United States v. Phillips 502 F. 2d 227 (4th Cir. 1974) is the correct interpretation of Ashe v. Swenson, supra. In Phillips case, the defendant was charged in an indictment with robbing a bank. At his trial, he sought to establish an alibi and challenged prosecution witnesses whose testimony placed him in the bank during the robbery. During its deliberating the jury asked the judge the following question:

"If we believe that Phillips was involved in the bank robbery but not at the bank at the time of the robbery, is he guilty or not guilty?...." The Judge replied that in that case he would not be guilty of robbery but could be found guilty of lessor included offense of knowingly possessing or dispossing of the proceeds. Ten minutes later defendant was convicted of lessor offense. This conviction was set aside and a new indictment was issued charging possession. Prior to swearing of jury, defendant moved to prohibit introduction of any evidence showing his presence in the

bank at the time of the robbery. His motion was overruled. At the trial, government offered evidence tending to establish defendant's presence in the bank at the time of the robbery. He was convicted. On appeal the Fourth Circuit panel reversed holding that the principle of collateral estoppel prohibited the introduction of the evidence showing the defendant's presence in the bank during the robbery. The panel held that the first jury effectively determined that Phillips was not in the bank at the time of the robbery. The panel held that the pivotal question was whether Phillips was present in the bank and that the verdict lead to the conclusion that the jury found that he was not in the bank. The panel further held that this evidence was not admissible even for the limited purpose of showing knowledge. En Banc *518* F. 2d *108* (1975) the panel decision was reversed although Phillips conviction was reversed on other grounds. The En Banc decision was that on the facts as recited in the panel's opinion the jury's implicit acquittal of bank robbery in the first trial did not collaterally stop the government from showing guilty knowledge by proof of defendant's presence and participation in the robbery.

Petitioner would urge that the en banc decision completely disregards this court's holding in Ashe v. Swenson and amounts to a refusal to correctly apply the Ashe decision. By implication, the Fourth Circuit has made the same determination in the petitioner's case which is just as erroneous.

The Phillips case is now before this Court on the government's petition filed July 30, 1975, case number 75-167.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER FINDINGS OF FACT ARE ESSENTIAL TO PROPER APPELLATE REVIEW WHERE THE RECORD SUGGESTS INCON-

SISTENT VERDICTS OR SUGGESTS SEVERAL LEGAL PRINCIPLES WHICH THE TRIAL COURT MIGHT HAVE INVOKED.

Rule 23 (c) of the Federal Rules of Criminal Procedure for United States District Court require district courts to make specific findings in fact in non-jury cases upon request. Courts constructing Rule 23 (c) have generally held that in the absence of such a request no special findings are necessary. United States v. Marquez 332 F. 2d 160 (2nd Cir. 1960); and Lofland v. United States 357 F. 2d 472 (9th Cir. 1966.) However, the case of Clayton v. United States 447 F. 2d 476 (9th Cir. 1971) seems to indicate that in a proper case the failure of the trial court to make special findings of fact may constitute reversible error, especially where such failure results to serious prejudice to the defendant.

Additionally, United States v. Livingston, 459 F. 2d 797 (3rd Cir. 1972) seems to stand for the proposition that findings of fact are essential to proper appellate review of a conviction resulting from a non-jury trial, when the facts of the case suggest several legal principles which the trial judge might have invoked. In Livingston, there is the following language at Page 779:

> "Findings of fact in non-jury criminal cases primarly aid the defendant is preserving questions for appeal and aid the appellate court in delineating the factual bases on which the trial court's decision rested. See Moore's Federal Practice (Cipes, 2d) Para 23.05. Indeed it has been suggested that findings under Rule 23 (c) are a perequisite to preserving for appeal issues concerning the significance or existence of a particular fact, see Wilson v. U. S. 250 F. 2d 312, 325 (9th Cir. 1957). Findings of fact are

essential to proper appellate review of a conviction resulting from a non jury trial. This was an important consideration when the present text of Rule 23 (c) was promulgated, changing existing law and requiring the trial judge to make special findings, if requested.

Petitioner would contend that not only would special findings be helpful in this case, they are absolutely necessary to the petitioner, to the government and to this Court. There is no way of determining from the record and other documents in this case what the trial judge determined the facts to be with respect to either December 3rd or February 27th. There is no way of knowing which legal principles he invoked in order to arrive at his different verdicts as to each date. The verdicts cannot be explained from the standpoint of logic or reason. Counsel for the government at the time of the oral arguments in the Fourth Circuit on September 4, 1974, stated in open court that he did not know how the trial judge arrived at his verdicts. Petitioner does not know. At this point, only the trial judge knows what he found the facts to be. Petitioner has previously argued in Points I and II that the verdicts appear to be inconsistent and that the doctrine of collateral estoppel may have been improperly applied. As a minimum, this court should remand this case to the Fourth Circuit with directions for the Fourth Circuit to remand to the trial judge with instructions to enter upon the record special findings as to verdicts rendered for offenses alleged to have been committed on each date. This idea was previously suggested by Chief Judge Haynsworth in his comments from the bench when this matter was argued before the Fourth Circuit on September 4, 1974.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EVIDENCE OF PETITIONER'S GUILT FOR OFFENSES COMMIT-

TED ON FEBRUARY 27, 1973 WAS SO LACKING IN SUBSTANCE THAT THE CONVICTIONS WHICH RESULTED THEREFROM VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSITUTION.

In previous parts of this petition, the petitioner has discussed in much detail the evidence in this case. In his brief filed with the Fourth Circuit the petitioner cited the following cases which taken together, positively indicate that the evidence in this case was insufficient. The cases are Gabriel v. United States, 366 F. 2d 726; United States v. Bethea, 442 F. 2d 790 (D. C. Cir. 1970; Bass v. United States 326 F. 2d 884 (8th Cir. 1964); U. S. v. Jones 308 F. 2d 26 (2nd Cir. 1962; Hernandez vs. U. S., 300 F. 2d 114 (9th Cir.); Brumbelow v. U. S., 323 F. 2d 703 (10th Cir. 1963); U. S. v. Jackson 408 F. 2d 306 (9th Cir. 1969); Jackson v. U. S. 423 F. 2d 506 (9th Cir. 1970). The Government conceded in its brief that the above cases would hold the isolated facts of February 27, 1973 to be insufficient evidence to support a conviction under the legal doctrine of constructive possession. (Govt. Brief p. 14). The case of Murray v. United States 403 F. 2d 694 (9th Cir. 1968) is very important to petitioner's case for as in petitioner's case it dealt with a close relationship between two brothers as the instant case deals with close relationship between two friends, petitioner and Stallings. In the Murray case, Lonnie Murray was charged with smuggling drugs. His brother whom he was accompanying was discovered to have illegal drugs on his person at the border inspection. The defendant and his brother denied the defendant's knowledge of the drugs. There was no other evidence as to the defendant's buying drugs. The Court reversed for lack of sufficient evidence, holding:

> "Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession."

Id. at 696, the Court added, with regard to the relationship between the brothers:

> "From the facts that Johnnie and Lonnie were brothers who maintained a close relationship with each other, that the trip was Lonnie's idea and he paid for the flight from San Fransico to Los Angeles, that Lonnie drove the borrowed car and that Lonnie may have had a stranger personality than Johnnie, no inference arose that Johnnie was subject to the control of Lonnie or that they were engaged in a joint venture, or that Lonnie could control the disposition of the heroin concealed on Johnnie's person."

It will be noted that in both Murray and petitioner's case, all defendants denied the involvement of Lonnie and petitioner, respectfully. In Murray the court said:

> "Lonnie and Johnnie both denied that Lonnie knew anything about the heroin. Johnnie gave an explanation about his own possession of the drug implicating only himself. The district court of course, could have disbelieved both of them, but rejection of their testimony on this point simply leaves a blank. It adds nothing to the proof. A conclusion that Lonnie and Johnnie lied about Lonnie's knowledge is not evidence that Johnnie told Lonnie or that Lonnie learned about it some other way. The burden is on the government to prove knowledge not upon Lonnie to dispose that fact.

Id. at 696.

Petitioner's case is very similar to the Murray case for a number of reasons all of which indicate that the evidence is insufficient.

The landmark case of Thompson vs. Louisville, 362, U. S. 199, holds that where the evidence is insufficient to support the convictions, the convictions violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner would argue that the due process clause of the Fifth Amendment was violated in his case.

V. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY PETITIONER'S ARREST AND THE SUBSEQUENT SEARCH WHICH RESULTED IN THE SEIZURE OF THE PISTOLS AND THE HEROIN.

Draper v. U. S. 358 U. S. 307 (1959), stated the baseline requirement for every arrest without a warrant is probably cause or a reasonable ground for belief of guilt.

It is basic that an arrest with or without a warrant must stand upon firmer grounds than mere suspicion, even though the arresting officer need not have in hand evidence which would suffice to convict. This is established in the following cases. Wong Sun v. U. S. 371 U. S. 471 (1963); U. S. v. Walker (1957) 7th Cir. 246 F. 2d 519; Hawkins v. U. S. (1961) 8th Cir. 246, 519; Hawkins v. U. S. (1961) 8th Cir. Mo. 288 F. 2d Cert. Den 366 U. S. 975; and Butler v. U. S. (1959) 9th Cir. 273 F. 2d 436.

The standards and procedures for determining probable cause in a warrantless arrest are best summed up in Israel and Latave, Criminal Procedure in a Nutshell, at Page 99.

> If the police had acted without a warrant, the probable cause determination must be made primarily upon the basis of the officer's testimony on the motion to suppress and there is some risk that the facts brought out at that time may not be limited to those upon which the officer acted.

Inasmuch as on the appeal from a conviction as this case is, the reviewing court will look at the evidence most favorable to the government's side in determining the question of probable cause, let's look at the evidence in that light.

With reference to the events of February 27, 1973, one event was Dove's presence with Stallings. Assuming that there was probably cause to arrest Stallings, the cases clearly state that one's mere presence with a suspect does not justify arrest. In United States v. Bazinet, 462 F. 2d 982 (8th Cir. 1972), there was a prosecution for conspiracy to rob a bank. The defendant was in a car with the prime subject (knox) and was known to the officer as a convicted felon. The Bazinet court held that mere presence with a suspect was not probable cause for arrest, relying heavily on United States v. Di Re, 322 U. S. 581:

> "In our view, Bazinet's arrest was illegal under United States v. Di Re, Supra, whose relevant facts closely parallel those before us. In Di Re, the police had information from a reliable informant, Reed, that one Buttitta was going to sell him some counterfeit gasoline ration coupons. They had no such information with respect to Di Re. When the Police arrived at the location where the sale was to occur, they found Reed, Buttitta, and Di Re in a car. They arrested all three, and in searching Di Re they discovered counterfeit gasoline ration coupons in his

pocket. A later search at the police station revealed additional coupons on Di Re's person. The government attempted to justify that of Di Re as incident to a lawful arrest.

The Supreme Court found that there was not probable cause for Di Re's arrest on the basis, that in the absence of other information tending to establish his culpability, his mere presence in the car with Buttitta and Reed did not warrant the inference that he was engaged in criminal activity. The court stated: .....The argument that one who accompanies a criminal to a crime rendezvous cannot be assumed to be a bystander...is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passerby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons and it would not follow that he would know them to be counterfeit..." United States v. Di Re, *Supra* 332 U. S. at 593, 68 S. Ct. at 228.

If anything, there is less reason to justify Bazinet's arrest than there was to support Di Re's. First, in Di Re, there was reason to suspect, and the Supreme Court assumed for purposes of argument that Di Re was present when the actual criminal transfer occurred. On our record, there was no act criminal in itself, committed by Knox in Bazinet's presence. Second, the Supreme Court held that Di Re would not necessarily know

that the coupons were counterfeit even if he had seen them. In our case, the evidence merely showed that Knox was carrying a paper bag; There is no evidence that Bazinet could see, or knew that contents were criminal if he had seem them. Third, Knox had carried the bag from the house while the police observed him the bag was found next to him on the seat and there was no creditable evidence of any reason for the police to suspect that Bazinet had any association with the bag or exercised any control over it, except for his presence in the same car. The bag was clearly Knox's fourth, the occurrences here took place under circumstances similar to those in Di Re, in that the meeting was "not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passerby, in a public street or a large City. Fifth, as in Di Re, the police had no information regarding Bazinet's present involvement in any crime but arrested him because of his presence in the car with Knox who was carrying, in a concealed fashion, items suggestive of criminal activity on his part. This is not enough to justify Bazinet's arrest.

Here the government may argue that Dove's act in taking the agents outside of the City limits is an act that justified his arrest. However, the record itself, sufficiently rebuts this argument for a number of reasons. First of all Dove's Mortuary was not secluded, the testimony indicated that the Mortuary sat right out in the open right next to a well traveled highway. In addition, it was in broad daylight. The Mortuary did not sit down a path a distance from the highway. The most important rebuttal of this argument is that both Price and Quander admitted that once they reached the Mortuary, Dove tried to get

them to go with him to Robbie's Rib House to locate Stallings. If as the Government argues Dove's purpose for leading the agents back to his Mortuary was to get them outside the City limits, how do you explain his invitation to them to go with him to the Rib House. Even in the light most favorable to the government, all that can reasonably be said is that Dove wanted to help them to find Stallings and that Dove did what anybody else would have done and that was to get one of the parties situated before he started looking for the other party. Otherwise by the time he found Stallings the agents may have been someplace else. On this point of extreme importance in Quander's testimony. The main point here is that ignoring this claim of the government that Dove was taking the agents to a secluded point, which the records compels you to do, taken along with Dove's ignorance of the conversation between Price and Stallings did not establish probable cause. See, United States v. Linc 464 F. 2d 356 (9th Cir. 1972) for a similiar point. There was no evidence that Dove overheard the conversation between Price and Stallings. The most that Price could say was that he was eight to ten feet away from where the conversation took place.

The testimony of McCracken the agent who ordered the arrest, indicates that after the van passed their observation point and after Stallings saw them, the van driven by Dove sped up. Apparently McCracken decided to arrest after he felt the agent's cover had been blown. The flight of a narcotics suspect has been held in itself not to justify an inference of guilt sufficient to generate probable cause for an arrest. Wong Sun v. U. S. cited Supra. There is some authority for the proposition that flight from an officer is grounds for arrest. However, the grounds upon which courts have held flight to be sufficient cause justifying an arrest are absent in this case. In United States v. Moore, 456 F. 2d 223 (5th Cir. 1972), the defendants

drove to within 36 feet of an illegal still, at which point federal officers appeared ordering them to halt, instead, the defendants whose identity was unknown fled. The agents first identified themselves as federal agents. The court found probable cause for arrest and stated:

> The flight of the suspects whose identity was unknown provided the exigent circumstances necessary for warrantless arrest. Willie B. Moore argues that she did not know the men approaching the pickup were federal officers. There is controverted testimony on whether the officers sounded their siren, but uncontroverted evidence that officer Zeigler displayed his badge and identified himself before Mrs. Moore brandished her gun. Moreover, officer Wilhjelm had identified himself as a Federal agent at the still site.

In United States v. Kansco (1958) 252 F. 2d 220 (2nd Cir), it was held that the fact that the suspect recognizes a narcotics agent following him in his capacity as an agent may explain the need for action without a warrant. The same was held in U. S. v. Soyka 394 F. 2d 443 (2nd Cir. 1968), where the suspect, upon seeing a federal agent in the hall near his apartment jumped back toward the inner recess of the apartment.

The above cases are obviously distinguishable from the instant case. The government's evidence of flight is at best ambiguous. The agents did not identify themselves as federal officers as the van passed them. Their car was not marked. It took them less than a quarter of a mile to catch up with Dove and they did this by reaching a top speed of 55 mph. In addition, according to the agents as soon as they flashed their light and identified themselves, the van immediately pulled over to the side of the road and stopped. That when ordered to do so, Dove immediately got out of the van and offered no resistance either before

or after his arrest. The testimony of McCracken does indicate that Price had advised him of his purchases from Stallings on December 3, 1972 and January 12, 1973. There again, that testimony may have furnished probable cause to arrest Stallings and even though Price may have advised McCracken that Dove was with Stallings on December 3, 1972, the holding of Bazinet and Di Re that "Mere presence is not enough" would again come into prominence.

Inasmuch as I cited earlier Israel and Latave to the effect that the "Probable cause determination is made primarily on the basis of the officer's testimony on the Motion to Suppress" let us look at McCracken's testimony. He stated that he arrested Dove and Stallings:

"Because I believed them to be in possession of drugs at the time."

McCracken never stated what the basis of the above belief was and nowhere does it appear in the record of this trial. However, his reason for arresting Dove can perhaps be explained from some of his other testimony. For example when he was being cross examined concerning whether they had made plans at the Holiday Inn to purchase drugs Dove in addition to Stallings, he said that they knew that Dove was associated with Stallings (38A et al). All through the trial, the theory of the government's case was that Dove was associated with Stallings therefore he was equally guilty. Perhaps the most important circumstances on this issue is the question of the raising of the trunk lid, which was to be the signal that Stallings had the drugs. You will recall from the testimony of the government that there was a meeting of the agents at the Holiday Inn, where a plan was developed. The plan was that Price would meet with Stallings. McCracken, Sheehan and King would observe the meeting. If at this meeting,

Stallings had the heroin Price would go to the trunk lid which would be the signal that Stallings had the heroin. The testimony of all the government agents was that at this meeting the signal was never given. Therefore the one event that was to furnish the agents with probable cause never took place (44A et al). In addition, from the time of the meeting between Price and Stallings and up to an including the time Dove and Stallings were later arrested, the sign was never given, nor was there any communication between Price and the arresting officers. Therefore, by its own witnesses, the government has shown an absence of probable cause for the arrest. In addition the government does not even contend that at the time, Dove and Stallings were seen operating the van in an area behind the Mortuary just before their arrest, that they were at that time on their way back to a meeting with Price. Weldon Hollowell, Assistant United States Attorney made the following argument for the government in response to our Motion to Suppress;

> And when they came back, (meaning when they were seen behind the Mortuary, Dove and Stallings) well, of course they see something that does not look right. They see some of these officers or they see that someone give rise to suspicion. And certaintly they didn't come back to see Price to complete that transaction.
>
> These officers knew that they had reasonable grounds to know that in all probability when they by passed and accelerated their speed, well certainly there was every probability that there was some controlled substance on that car, on that econoline, whatever they, they called it the ford vehicle. (71A et al).

If as the government contends, Dove and Stallings were not headed back for a meeting with Price, then the only reasonable conclusion to be drawn from that circumstance would be that Stallings did not have the heroin at that time. For according to Price Stallings had gone off to get the heroin and if Stallings had the heroin at the time the agents saw them behind the Mortuary then Stallings, in all probability would have been heading back for a meeting with Price. If they were not heading back for this meeting, they must have been going someplace else and in all probability to deliver the funiture as Dove and Stallings both stated.

What, in all probability happened was that when McCracken saw the van come down the road behind the Mortuary and make a left turn down a paved road away from the Mortuary, he panicked and made a hasty decision to make a premature arrest. If he had only waited, in all probability Stallings would have gone back into New Bern, met with his source and would have come back to the Mortuary and made the deal with Price, at which time Price would probably have given the signal, thereby furnishing McCracken with probable cause. Certainly this court should not uphold the hasty, panicky decision of a drug agent who acted on impulse and mere suspicion.

It would have been helpful to counsel and to this reviewing court if Judge Larkins had made findings of fact with respect to whether or not the evidence established flight on the part of the defendant, whether or not Dove and Stallings recognized the agents as being agents. All of the evidence would tend to indicate that Dove did not see them. The fact that Stallings only had eight grams of heroin certainly indicates that he was not on his way back to meet with Price and indicates further that this eight grams of heroin was not the heroin that had been the subject of the meeting with Price. It would have been

helpful if McCracken had stated his grounds for believing the van contained narcotic drugs at the time he gave the order to arrest. McCracken, not having stated his grounds it is very difficult for counsel to point out to this reviewing court why those grounds were insufficient. In the absence of any statement, counsel must assume that he acted upon the grounds stated by U. S. Attorney Hollowell, those being the fact that the van bypassed the Mortuary and went in a direction away from the Mortuary at an accelerated speed from the Mortuary; that is not probable cause.

Based on the above it is the contention of the defendant that the facts within the knowledge of McCracken, Sheehan and King, whether personal or hearsay did not furnish them with sufficient knowledge to constitute probable cause for the arrest of the defendant. Brinegar v. U. S. 338 U. S. 160 (1948), which gives the classic definition of probable cause states the facts must be "within the arresting officer's knowledge".

In addition even if the arrest were lawful, which counsel does not concede and in fact denies, the subsequent search of the van not having been made as an incident to the arrest was therefore illegal. King, who searched the van stated that he did so to see if anyone else was in the van and for that reason alone. Once he accomplished that purpose, he should have stopped. Any search beyond that point would have amounted to an unlawful intrusion; therefore the subject search and seizure of the heroin was unlawful and illegal. In addition in that Dove and Stallings had been taken into custody and secured there was no need or exigent circumstances warranting the search which produced the heroin. Therefore, it was illegal. Chimel v. California 345 U. S. 752 (1969).

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

JOHN H. HARMON
P.O. Box 636
New Bern, N. C. 28560
Tel: 919-633-3114

NORRIS C. REED, JR.
415 Broad Street
New Bern, N. C. 28560
Tel: 919-637-2789

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has today served a copy of the foregoing petition on the Honorable Robert Bork, Solicitor General, Department of Justice, Washington, D. C. by delivering a copy to the United States Mail, postage prepaid addressed to him at the Department of Justice, Washington, D. C.

This 3rd day of October, 1975.

John H. Harmon
ATTORNEY FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-

OSCAR ROOSEVELT DOVE
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

Appendix to

Petition for Writ of Certiorari to

the United States Court of Appeals

for the Fourth Circuit.

JOHN H. HARMON
P.O. Box 636
New Bern, North Carolina 28560
Tel: 919-633-3114

NORRIS C. REED, JR.
415 Broad Street
New Bern, North Carolina 28560
Tel: 919-637-2789

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2193

UNITED STATES OF AMERICA, *Appellee,*

-versus-

OSCAR ROOSEVELT DOVE, *Appellant.*

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. John D. Larkins, Jr., District Judge.

Argued: September 4, 1974.

Decided: September 23, 1974

Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

John H. Harmon (Norris C. Reed, Jr., on brief) for Appellant; Carl L. Tilghman, Assistant United States Attorney, (Thomas P. McNamara, United States Attorney, and Malcolm J. Howard, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Oscar Roosevelt Dove was found guilty by the District Court, sitting without a jury, of possession of heroin, in violation of 21 U.S.C. §841, and unlawfully carrying a firearm while in the commission of a felony, in violation of 18 U.S.C. §924 (c).

Upon considering the record, briefs and oral argument, we find no reversible error, and affirm the judgment of the District Court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2193

United States of America, *Appellee,*

versus

Oscar Roosevelt Dove, *Appellant.*

ORDER

Treating Mr. Harmon's letter of June 10, 1975 as another petition for rehearing and after circulation of copies of the letter to all members of the court, and upon consideration thereof and of the earlier petition for rehearing with its suggestion for rehearing *en banc* filed on October 4, 1974, and no request for a poll of the court having been received from any judge in regular active service.

IT IS NOW ORDERED, with the concurrence of Judge Russell and Judge Widener, that such petitions for rehearing be, and each of them is, hereby denied.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Judicial Circuit

July 23, 1975

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 73-2193

United States of America, *Appellee,*

vs.

Oscar Roosevelt Dove, *Appellant.*

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

William K. Slate, II
CLERK

OVER

Supreme Court of the United States

No. A-192

OSCAR ROOSEVELT DOVE,
Petitioner

V.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION

FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner (s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 6, 1975.

/S/ William H. Rehnquist
Associate Justice of the Supreme Court of the United States

Dated this 3
day of September, 1975.

Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

No. 75-543

In the Supreme Court of the United States

OCTOBER TERM, 1975

OSCAR ROOSEVELT DOVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUGGESTION OF ABATEMENT CAUSED BY DEATH

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-543

OSCAR ROOSEVELT DOVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUGGESTION OF ABATEMENT CAUSED BY DEATH

Petitioner was convicted of possessing heroin with intent to distribute, in violation of 21 U.S.C 841(a)(1), and of carrying a firearm during commission of that offense, in violation of 18 U.S.C. 924(c). The court of appeals affirmed (Pet. App. 47–48). Counsel for petitioner has filed a Suggestion of Death supported by a certificate showing that petitioner died November 14, 1975. Accordingly, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the district court with directions to dis-

miss the indictment. *Durham* v. *United States,* 401 U.S. 481.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1976